

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5**

AMERICAN EAGLE PROTECTIVE  
SERVICES CORPORATION AND  
PARAGON SYSTEMS, INC., JOINT EMPLOYERS

and

Case No. 5-CA-126739

UNITED GOVERNMENT SECURITY OFFICERS  
OF AMERICA, LOCAL 034, AFFILIATED WITH  
UNITER GOVERNMENT SECURITY OFFICERS  
OF AMERICA INTERNATIONAL UNION

**COUNSEL FOR THE GENERAL COUNSEL'S  
RESPONSE TO RESPONDENTS' AMENDED ANSWER, RESPONDENTS' BRIEF IN  
RESPONSE TO NOTICE TO SHOW CAUSE, AND REQUEST THAT THE MOTION  
FOR SUMMARY JUDGMENT BE GRANTED**

Now comes Benjamin W. Palewicz, Counsel for the General Counsel and pursuant to Sections 102.24, 102.35(a)(8), and 102.56 of the National Labor Relations Board's (herein called the Board) Rules and Regulations and Statement of Procedures, Series 8, as amended, files this Response to Respondents' Amended Answer and Brief in Response to Notice to Show Cause, and Request that the Motion for Summary Judgment be Granted, and in support of said Response, states as follows:

1. On September 22, 2015, Administrative Law Judge Eric M. Fine issued his Decision in the above-captioned matter, finding that Respondents engaged in certain unfair labor practices requiring Respondents, inter alia, to make whole, with interest, the discriminatees involved in the case for any loss of earnings or other benefits suffered as a result of the Respondents' unlawful conduct.<sup>1</sup>

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<sup>1</sup> A copy of the Decision is attached as Exhibit 1.

2. Judge Fine's Decision requires in part that as a remedy, "upon request of the Union on behalf of any particular affected employees, employees may receive, as a lump-sum payment, the total amount of health and welfare contributions made on the employees' behalf by Respondents to each employee's 401(k) account between OCTOBER 28, 2013 AND October 16, 2014. Respondents shall bear all costs and fees, and tax consequences for withdrawal of said monies from employees' 401(k) accounts."
3. No statement of exceptions was filed with the Board within the time allowed for filing such exceptions.
4. On November 4, 2015, the Board issued an Order adopting the Administrative Law Judge's Decision.<sup>2</sup> The Region has not sought enforcement of the order to date.<sup>3</sup> Respondents did not file a petition for review of the Board's Order.
5. On February 28, 2017, the Regional Director for the Fifth Region issued and served on Respondents a Compliance Specification and Notice of Hearing.<sup>4</sup>
6. In the "Answer Requirement" portion of the Compliance Specification, Respondents were advised, in pertinent part: "[a]s to all matters set forth in the compliance specification that are within the knowledge of Respondents, including but not limited to the various factors entering into the computation of gross backpay, a general denial is not sufficient... Rather, the answer must state the basis for any disagreement with any allegations that are within the Respondents' knowledge, and set forth in detail Respondents' position as to the applicable premises and furnish the appropriate supporting figures."

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<sup>2</sup> A copy of the Order is attached as Exhibit 2.

<sup>3</sup> In Counsel for the General Counsel's Motion to Transfer to and Continue Proceedings Before the Board and for Summary Judgment, Counsel for the General Counsel inadvertently stated that the D.C. Circuit enforced the Board's Order in the instant case.

<sup>4</sup> A copy of the Compliance Specification is attached as Exhibit 3. A copy of the Affidavit of Service of the Compliance Specification and Notice of Hearing is attached as Exhibit 3(b) showing that said document was mailed by certified mail on February 28, 2017 to Respondents and Respondents' attorney of record.

And further: "... if the answer fails to deny allegations of the compliance specification in the manner required to under Section 102.56(b) of the Board's Rules and Regulations, and the failure to do so is not adequately explained, the Board may find those allegations... are true and preclude the Respondents from introducing any evidence controverting those allegations."

7. On March 28, 2017, the Regional Attorney for the Fifth Region sent a letter to Respondents, advising them that no answer had been received from the Respondents, and that "if an Answer [was] not received...by close of business on Tuesday, April 4, 2017, [the Region would] file a Motion for Default Judgment pursuant to Sections 102.23(a),(b) and 102.50 of the Board's Rules and Regulations."<sup>5</sup>
8. On April 3, 2017, Respondents filed an Answer and Notice of Defenses.<sup>6</sup> Counsel for the General Counsel maintains that in their Answer, Respondents failed to comply with the specific answer requirement set forth in Section 102.56(b) of the Board's Rules and Regulations. Counsel for the General Counsel maintains that general denials are insufficient when gross backpay calculations for the discriminatees is something that is "within the knowledge" of Respondents, and thus requires Respondents to include its basis for disagreement with any allegations that are within the Respondents' knowledge, and set forth in detail Respondents' position and furnish appropriate supporting figures and calculations. Respondents' Answer failed to meet this requirement by failing to provide the supporting information, as mandated by Section 102.56(b).
9. On April 6, 2017, counsel for the General Counsel filed a Motion to Transfer Case to and Continue Proceedings Before the Board and for Summary Judgment<sup>7</sup>.

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<sup>5</sup> A copy of that letter is attached as Exhibit 4. Respondents argue that the General Counsel has failed to meet procedural requirements by filing its motion without notifying Respondents, in writing, about the alleged deficiency of its Answer. Respondents fail to mention, however, that the General Counsel, consistent with § 10652 of the Casehandling Manual, Part Three, had just notified Respondents of its deficiency in not filing any Answer at all, after the Compliance Specification itself had also put Respondents on notice of its responsibilities in answering the Compliance Specification. Having already provided Respondents with two opportunities to fulfill its responsibilities, the counsel for the General Counsel maintains that Respondents were adequately only notice of their responsibilities, and the decision to not give Respondents a third attempt is not a procedural defect.

<sup>6</sup> A copy of the Answer and Notice of Defenses to Compliance Specification and Notice of Hearing is attached as Exhibit 5.

<sup>7</sup> A copy of that Motion is attached as Exhibit 6.

10. On April 10, 2017, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause, requiring that “cause be shown, in writing on or before April 24, 2017, why the General Counsel’s Motion should not be granted.”
11. On April 12, 2017, Respondents filed an Amended Answer to the Compliance Specification and Notice of Hearing. On April 21, 2017, Respondents filed a response to the Notice to Show Cause.
12. Counsel for the General Counsel maintains that the Amended Answer fails to comply with Section 102.56(b). Contrary to Respondents’ contentions, their Amended Answer failed to dispute the accuracy of the Compliance Specification<sup>8</sup> in detail and attempts to re-litigate the underlying unfair labor practice. The Board has repeatedly held that a “general denial of allegations regarding the backpay period and gross backpay calculations is insufficient to comply with the specificity requirements of Section 102.56(b).” *United States Service Industries*, 325 NLRB 485 (1998); *Mining Specialists*, 330 NLRB 99, 101 (1999). Respondents’ Amended Answer fails to dispute the accuracy or premises on which the figures in the Compliance Specification are based. Specifically, Respondents’ Exhibit B attached to their Amended Answer fails to meet this standard. See *Imac Energy Inc.*, 322 NLRB 892, 893-894 (1997); *Random Acquisitions, LLC*, 359 NLRB 567, 568 (2013), see also *Random Acquisitions, LLC* 360 NLRB No. 1, slip op. at 1 (2013). The Board has also held respondents are required to do more than simply criticize the bases for the specification or express disagreement with General Counsel’s allegations, and must set forth in detail the Respondents’ position as to the applicable premises and furnish the appropriate supporting figures. *SRC Painting, LLC*, 356 NLRB No. 74, slip op. at 2 (2011); *DeMuth Electric*, 319 NLRB 942, 943 (1995).
13. In disputing the Compliance Specification, Respondents’ Amended Answer Exhibit B lists the amounts of money paid into §401(k) accounts for the discriminatees over the course of several pay periods. The amounts listed under the column labeled “H&W

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<sup>8</sup> Respondents’ Exhibit B is a document previously presented to the Region, which the Region used to determine the amounts due to the discriminatees. A copy of Respondent’s Exhibit B is attached as part of Exhibit 7.

Reported” are the same amounts relied upon and set forth in the Compliance Specification. The amounts in the Compliance Specification Exhibit 1 correspond exactly to the “H&W Reported” amounts in the first set of data on page 1 of Respondents’ Exhibit B. Thus, in response to the Compliance Specification, Respondents have failed to show any basis for a disagreement or supporting evidence that figures relied upon and set forth in the Compliance Specification are inaccurate. Additionally, Respondents’ Amended Answer fails to propose an alternate method of calculating the amount due. As explained above, Section 102.56(b) requires that the Respondents supply figures, calculations, or an explanation for its denials.<sup>9</sup> Counsel for General Counsel maintains Respondents’ Amended Answer fails to meet Section 102.56(b), and that, at a minimum, partial summary judgment is warranted as to these amounts.

14. In its Amended Answer to the Compliance Specification, Respondents assert several affirmative defenses. A brief examination of Respondents’ affirmative defenses highlights the deficiencies in their Amended Answer, warranting at least partial summary judgment. Respondents’ first and second affirmative defenses pertain only to the underlying unfair labor practice hearing, and their fourth affirmative defense has no apparent applicability in this case. Respondents’ third, sixth, and seventh defenses should be struck as they attempt to re-litigate the legal arguments that were or could have been presented at the trial below, or on exceptions to the Board. In *Triple A Fire Protection, Inc.*, 353 NLRB 838, 839-40 (2009), the Board held that “[i]ssues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding.” To the extent that Respondents are challenging the prior Board Order, counsel for the General Counsel maintains that they should be precluded from raising these arguments at this juncture.

15. Respondents’ fifth affirmative defense should be struck as it lacks the requisite specificity mandated by Section 102.56(b). Section 102.56(c) of the Board’s Rules and Regulations

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<sup>9</sup> At root, Respondents do not appear to challenge the calculations involved, but the feasibility of the remedy itself. In this regard, counsel for the General Counsel maintains that Respondents have similarly failed to meet their burden, or even offer any specifics as to alternatives to the Board Order.

states that “[i]f the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegations, and the Respondent will be precluded from introducing any evidence controverting the allegation.” As explained above, Respondents have not proposed any alternative means of calculating the amounts owed to the discriminatees. Respondents take issue with the remedy ordered by ALJ Fine in his Decision below, but Respondents failed to file exceptions, and Respondents fail to explain how the Region’s calculations are incorrect. Thus, counsel for the General Counsel maintains that Respondents are attempting to raise a legal argument that should have been raised in exceptions to the Administrative Law Judge’s decision. Respondents admit on page 3 of their Brief in Response to the Notice to Show Cause that “[t]he crux of this case” is “the appropriate remedy” not the amount of the remedy. Respondents’ dispute is not with the Region’s calculations, but rather with the Remedy set forth in the underlying Board Order and decision. Counsel for the General Counsel maintains that issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. See *Triple A Fire Protection*, 353 NLRB 838, 839-40 (2009); *Imac Energy, Inc.*, 322 NLRB 892, 894 (1997). Counsel for the General Counsel maintains that Respondents’ contention fails to meet the specificity requirement and should be struck.

16. As there is no remaining genuine issue of fact or law to be considered regarding the gross backpay which includes benefits, summary judgment is proper on those issues, and the calculations described in the Compliance Specification and Notice of Hearing should be deemed as true. *Positive Electrical Enterprises, Inc.*, 353 NLRB 283, 284 at fn. 7 (2008).

WHEREFORE, counsel for the General Counsel respectfully requests, in accordance with Section 102.56(c) of the Board's Rules and Regulations, that the Board deem all matters alleged in the Compliance Specification to be true, and that they be so found, that Respondents be precluded from introducing any evidence controverting the allegations of the Compliance Specification, and that a Decision and Order be issued containing finding of fact, conclusions of law, and an appropriate remedy for the violations herein.

Dated at Baltimore, MD this 3rd day of May, 2017.

Respectfully submitted,

/s/  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of May, 2017, I served the Counsel for the General Counsel's Motion for Summary Judgment on the following individual by electronic mail:

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